DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

8233

FILE: B-192316 DATE: November 1, 1978

MATTER OF: Ikard Manufacturing Company

DIGEST:

1. Prior GAO decision held that once contracting officer decides to conduct new competition for reprocurement, he may not automatically exclude defaulted contractor from that competition. Prior GAO decision did not hold that defaulted contractor has automatic right to resolicitation.

2. Army's contention that every defaulted contractor has clearly demonstrated his nonresponsibility as matter of fact and law is without merit. Because it is necessary to view factual context within which default occurs it would be improper to lay down rule that defaulted contractor need not ever be considered in reprocurement.

3. Because of relatively short period of time in which reprocurement contract for critically needed item had to be consummated and because offerors solicited were familiar with contractual requirements, GAO finds no abuse of discretion by contracting officer in limiting reprocurement competition to prior producers.

4. Protester failed to meet its burden of proof on its allegations about its ability to supply urgently needed items in less time than offerors Army had solicited since only evidence on matter consisted of conflicting statements between Army and protester.

Ikard Manufacturing Company (Ikard) protests the United States Army Missile Materiel Command's limiting of the reprocurement action for a part used in the Nike Missile System after its contract to produce this part had been terminated for default. The Army restricted the reprocurement to offerors who had previously produced the part. Because Ikard had failed to deliver any quantities of the part, it was deemed not to qualify as a prior producer.

On March 22, 1977, the Army awarded to Ikard contract DAAH01-77-C-0335 which called for 1,050 each Fastener, Flap at a total contract price of $14,595. Delivery was required on August 19, 1977, 130 days after award. Ikard, however, did not deliver on this date and the Army modified the contract, extending the delivery date to November 30, 1977. When Ikard again did not deliver, the Army issued a "show cause" letter on December 5, 1977. Ikard responded to the Army's letter on December 14, 1977. After reviewing the reasons given by Ikard for failing to deliver on time, the Army decided to forbear from terminating for default and further extended the delivery date to April 30, 1978. When Ikard still did not deliver, the Army issued a termination for default letter on May 25, 1978.

The Army states that because of Ikard's failure to deliver after 425 days from the award of the contract to it, there was at the time of termination a critical need for the part because of a zero balance in the Army's inventory and unfilled back orders with past due delivery dates from various missile installations. Consequently, the Army's requirement for the part was upgraded from a low priority to a high priority.

On June 13, 1978, the Army issued request for proposals (RFP) No. DAAH01-78-R-0888 for the 1,050 Fasteners called for under the terminated contract. The closing date for receipt of proposals was June 26, 1978. Because the closing date was less than 15 days from the date of issuance, the solicitation was not synopsized in the Commerce Business Daily. See Armed Services Procurement Regulation (ASPR) § 1003.1(c)(iv) (1976 ed.). The following price proposals were received by the Army on June 26, 1978:

Precision Specialty Corporation	$18,375.00
Special Projects Machine and Tool	12,600.00
Die and Tool Products, Inc.	12,253.50

In a letter dated June 30, 1978, and received by us on July 5, 1978, Ikard protested any award under the RFP on the basis that the Army by restricting the RFP to only three firms prevented free and open competition. Further, Ikard stated that as a result of the restriction, it was prevented from submitting a quote or offer even though in its opinion it could have been the most responsive offeror to the RFP.

The Army on August 25, 1978, awarded contract No. DAAH01-78-C-1155 to Die and Tool Products, Inc., for the production of the needed part. The award was made pursuant to ASPR § 2-407.8(b)(3)(i) (1976 ed.) which permits award during the pendency of a bid protest when it is properly determined that the items being procured are urgently required. By a letter dated the same date, the Army notified Ikard of the award.

Ikard alleges that the cause of its failure to deliver was difficulties with a particular subcontractor and that at the time the Army terminated its contract it had just received the last subcontractor item. Therefore, according to Ikard, at the time of termination all materials required for the manufacture of the contract part were "in-house." Ikard contends that the Army was aware of this situation. Ikard, then, questions the necessity of the reprocurement solicitation to prior producers because it could make delivery of the required part earlier than any other manufacturer and at a more reasonable price.

The Army acknowledges that a limited procurement is not a preferred procurement method. Nevertheless, the Army states that a limited procurement was justified here because of the zero balance of the contract part and because of the time involved in ordering the documentation needed to solicit by formal advertising. The Army also states that it has no intention of making the item sole source or noncompetitive for future requirements. With regard to Ikard's contention that it had all the materials needed for manufacture in-house

at the time of termination, the Army states that Ikard did not provide sufficient evidence that it could be responsive to the requirements in the reprocurement solicitation.

In response to the Army, Ikard argues that it is good common judgment that if a manufacturer has all the materials for the part on hand and if some of these materials require a long leadtime for delivery from subcontractors, the manufacturer having the materials on hand can deliver the required quantity of parts earlier than someone having to start from "scratch." Ikard disputes the Army's contention that it lacked sufficient evidence that Ikard could be responsive to the requirements of the reprocurement solicitation. Ikard contends that the Army had complete knowledge of the fact that it had in-house all the parts and materials required for manufacture. Ikard alleges that it informed the Army of this situation during an April 13, 1978, meeting and by a letter dated April 21, 1978.

The Army contends that our decision in PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213, to the extent that it appears to hold that a defaulted Government contractor has an "automatic right" to be resolicited, is inconsistent with relevant ASPR provisions and with the intent of Congress as expressed in 10 U.S.C. § 2202 under which ASPR was promulgated. The Army refers to subparagraphs (a) and (b) of ASPR § 8-602.6 which is entitled "Repurchase Against Contractor's Account." These subparagraphs provide in pertinent part as follows:

> "(a) Where the supplies or services are still required after termination, repurchase of supplies or services which are the same as or similar to those called for in the contract shall be made against the contractor's account as soon as practicable after termination. Such repurchase shall be at as reasonable a price as practicable considering the quality required by the Government and the time within which the supplies or services are required. * * * (Underscoring added.)

"(b) If the repurchase is for a quantity not in excess of the undelivered quantity terminated for default, the requirements of 10 U.S.C. 2304(a), with respect to formal advertising, are inapplicable. However, the PCO may use formal advertising procedures. If the PCO decides to negotiate the repurchase contract, he may either (1) use any authority listed in 3-201 through 3-217 (10 U.S.C.2304(a)(1)-(17), as appropriate, or (2) if none of those authorities to negotiate is used, the contract shall identify the procurement as a repurchase in accordance with the provisions of the default clause in the defaulted contract.
* * *"

The Army argues that in electing not to resolicit Ikard it acted strictly in accordance with the broad discretion lawfully conferred under ASPR § 8-602.6 and in strict furtherance of the stated congressional purpose for which the regulation was promulgated. The Army points out that nowhere does ASPR § 8-602.6 require resolicitation of a defaulted contractor. The Army further states that no court or administrative board has ever held that resolicitation of a defaulted contractor is a prequisite in reprocurement action. Therefore, it is the Army's position that a defaulted contractor's automatic "right" to resolicitation is clearly nonexistent under the established law of Government contracting.

In PRB Uniforms, Inc., supra, we held that while the statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, once the contracting officer decides that it is appropriate to conduct a new competition for the reprocurement, he may not automatically exclude the defaulted contractor from that competition. Otherwise, such exclusion would constitute an improper premature determination of nonresponsibility. We also pointed out that our prior cases stating that the defaulted contractor could be disregarded as a source of supply either arose out of a proper sole-source reprocurement or were essentially predicated on the nonresponsibility of the defaulted contractor for the repurchase contract. Our decision, then, dealt

essentially with whether a defaulted contractor could be regarded as per se nonresponsible for the reprocurement contract.

The Army states that its contracting officers usually do not terminate defaulting contractors even when they have a clear right to do so, unless they conclude that they have no reasonable expectation of obtaining the needed supplies from the defaulting contractor. In this regard, the Army argues that as a general rule a defaulted contractor has clearly demonstrated his nonresponsibility as a matter of fact and law. A requirement that contracting officers resolicit a defaulted contractor is in the Army's opinion an unwarranted invasion of their broad discretion to reprocure upon such terms and conditions as are appropriate.

We note, however, that the boards of contract appeals do not exclude a defaulted contractor from participation in the reprocurement process regardless of the circumstances. See World-Wide Development Co., Inc., ASBCA Nos. 16608, 16717, 73-2 BCA 10, 249, affirmed on reconsideration 74-1 BCA 10, 474; Tom W. Kaufman Co. GSBCA 4623. It is true that these decisions concern the Government's requirement to mitigate its damages before assessing the defaulted contractor with any excess costs for reprocurement. Nevertheless, we believe they do stand for the proposition that because it is necessary to view the factual context within which a default occurs, it is improper to lay down any hard-and-fast rule that a defaulted contractor need not ever be considered in a reprocurement.

With regard to the contracting officer's right to reprocure upon such terms and in such a manner as he deems appropriate, we have recently held that the contracting officer does indeed have considerable latitude in determining the appropriate method of reprocurement, provided his actions are reasonable and consistent with the duty to mitigate damages. See Hemet Valley Flying Service, Inc., 57 Comp. Gen. ___ (B-191922, August 14, 1978), 78-2 CPD 117. It is only when the contracting officer decides to conduct a new competition for the reprocurement that he cannot choose to ignore the regulatory provisions applicable to competitive procurements. Hemet Valley Flying Service, Inc., supra.

Consequently, we see no basis for the Army's contention that our decisions in this area are inconsistent with the relevant ASPR regulations concerning reprocurement following default.

We do not, however, believe that the protested procurement is objectionable. Because of the relatively short period of time in which a contract for the critically needed quantity of parts had to be consummated and because the offerors that were solicited were familiar with the contractual requirements, we find no abuse of discretion by the contracting officer in limiting the reprocurement competition to prior producers. See Nationwide Building Maintenance, Inc., B-186602, December 9, 1976, 76-2 CPD 474. This Office will take no exception to the actions of the contracting officer in the absence of any indication that he abused his discretion by limiting competition. See Non-Linear Systems, Inc.; Data Precision Corporation, B-183683, October 9, 1975, 75-2 CPD 219. We have in the past also indicated that the Government's interest in obtaining maximum competition is to be weighed against a bona fide administrative determination that the exigencies of a particular procurement are such that the delay involved in obtaining maximum competition would adversely affect the Government's interest. 36 Comp. Gen. 809 (1957).

As to Ikard's allegations that it could have supplied the urgently needed parts in much less time than the offerors whom the Army solicited, the record shows only conflicting statements of fact between the Army and Ikard. The protester has the burden of affirmatively proving its case. This burden has not been met where the conflicting statements of the parties constitute the only evidence. A. J. Fowler, B-191636, October 3, 1978.

Accordingly, Ikard's protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States